With regard to the second limb of the definition of a common gaming house a club or any premises for that matter will become a common gaming house even if the public is not allowed into the premises if the place is kept primarily for the purpose of gaming. An ordinary social club will not become a common gaming house merely because facilities are provided for its members to gamble even habitually at the premises. It is only when a club or any premises are being used primarily for the purpose of gambling that would make the club or the premises a common gaming house. It is necessary therefore to consider the activities of the N.S.C.R.C. The President of the N.S.C.R.C. had said in evidence that the main object of the Club was to sponsor sports such as soccer, rugby, tennis, athletics and indoor games such as billiards, badminton and mahjong and gaming such as gin rummy and pai kow. All these games and activities were being carried on by the Club. It is true that a substantial amount of revenue did come from gaming but this cannot be the sole criterion in deciding whether the N.S.C.R.C. is a social and recreational club which allows facilities for gambling for its members or whether it is a common gaming house. All the other activities of the Club have got to be taken into account. The press release by the Secretary of the Club therefore does not aid the prosecution case for it merely stresses the financial aspect of the Club and does not go to any proof that gaming is primarily carried on at the premises especially in the light or the evidence that a host of social and sporting activities are also being carried on at the Club.

I agree entirely with the findings of the learned Magistrate and with his decision to acquit and discharge all the accused persons. I also agree with his order that all exhibits taken from the accused persons and from the office of the N.S.C.R.C. be returned. However I do not agree with his order of forfeiture of the exhibits taken from the table and drawers. The learned Magistrate obviously felt that he was empowered and indeed obliged to order the forfeiture of these exhibits under the provisions of section 16(2) of the Common Gaming Houses Ordinance which is to the effect that all instruments or appliances for gaming, securities for money and other articles found in a common gaming house or on any persons found therein or escaping therefrom and which the Magistrate is of opinion were used or intended to be used for any game or lottery shall be declared by him to be forfeited. The forfeiture provisions of section 16(2) are mandatory but before they can be invoked there must be a specific finding by the trial court that the premises concerned were used or kept as a common gaming house. Here the learned Magistrate having found that the N.S.C.R.C. was not a common gaming house his order of forfeiture of the articles found on the table and drawers was clearly wrong.

The appeal by the Public Prosecutor is dismissed. The cross-appeal is allowed and I direct that all the exhibits recovered from the table and drawers be returned to the N.S.C.R.C.

Appeal dismissed; Cross-appeal allowed.

Solicitors: *Shearn, Delamore & Co.*

LO KIM PENG & ORS. v. PUBLIC PROSECUTOR

[A.Cr.J. (B.T.H. Lee J.) June 21, 1978]

[Sabah — Criminal Appeals Nos. 24 to 28 of 1977]

Fisheries — Fishing with a trawl net within prohibited limits — Charge for contravening reg. 4(3) of Fisheries Regulations, 1964 — Plea of guilty — Appeal — Magistrate failed to comply with s. 173(b), C.P.C. — Fisheries Act, 1963, ss. 15 & 19 — Fisheries Regulations, 1964, regs. 4 & 9 — Criminal Procedure Code, s. 173(b).

Fisheries — Licensing officers had no authority to issue licence — Conviction under reg. 9 of Fisheries Regulations, 1964 quashed — Fisheries Act, 1963, ss. 2 & 23.

Criminal Law and Procedure — Plea of guilty — Failure to ascertain whether accused understood nature and consequences of plea and admitted offence without qualification — Effect of — Criminal Procedure Code, s. 173(b).

There are five appeals in this case. The accused in Appeals Nos. 24, 25 and 28 of 1977 were convicted for fishing with a trawl net within five fathoms in contravention of Condition 1(a) of the licence. The offence committed under reg. 4(3) of the Fisheries Regulations, 1964 was punishable under reg. 9 of the same Regulations.

The accused in appeal nos. 26 and 27 of 1977 were charged for fishing with a trawl net without a licence in contravention of reg. 4(1)(b) of the said Regulations, an offence under reg. 4(3) and punishable under reg. 9.

The accused appealed, *inter alia*, on the ground that the Magistrate failed to comply with section 173(b) of the Criminal Procedure Code.

Held: (1) there was no proper exercise by the licensing officers of the power which, so far as the court could ascertain had not been vested in them. The purported exercise of their authority in issuing licences was accordingly invalid;

(2) the records of proceedings revealed that there was nothing on the facts recorded in the above appeals which could lead to the conclusion that any of the five appellants was guilty of the offences charged;

(3) there was a failure on the part of the Magistrate to comply with the provisions of section 173(b) of the Criminal Procedure Code.

Cases referred to:-

(1) *Chua Ah Gan* v. *Public Prosecutor* [1958] M.L.J. liv.
(2) *Chin Ban Keat* v. *R.* [1949] M.L.J. 297.
(3) *Cheam Gaik Chye* v. *Public Prosecutor* [1967] 1 M.L.J. 52.
(4) *Municipal Commissioners* v. *Chuah Seng & Ors.* (1882) 3 Ky. 140.
(5) *Cheam Gaik Chye* v. *Public Prosecutor* [1967] 1 M.L.J. 51.
(6) *Cheah Yew Fatt* v. *Public Prosecutor* [1960] M.L.J. xlvi.
(7) *R.* v. *Rollafson* [1969] 2 All E.R. 833.
(8) *Sau Soo Kim* v. *Public Prosecutor* [1975] 2 M.L.J. 134.

CRIMINAL APPEALS.

C.T. Wong and *Samson Chin* for the appellants.

Abdul Wahab Patail (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

B.T.H. Lee J.: These are five appeals, the accused in three of which namely Appeal Nos. 24/77, 25/77 and 28/77 were convicted in the Magistrate's Court, Tawau, in contravention of Condition 1(a) of the said licence, an offence under Regulation 4 of the Fisheries Regulations, 1964 (hereinafter called "the said Regulations"). The remaining two appeals Nos. 26/77 and 27/77 will be discussed at a later stage.

I turn to Appeal Nos. 24/77, 25/77 and 28/77, the first charge of which is in these terms:—

"That you, on or about the 5th of September, 1977, between 1040 hours and 1115 hours at Sungei Kalabakan, near Oyster Culture Experimental Station, in the District of Tawau, in the State of Sabah, being the holder of licence No. 20307 (A-82/2), did use, for the purpose of fishing, a net, to wit a trawl net, at a place between the State shore and 5 fathom line, in contravention of Condition 1(a) of the said licence, and thereby committed an offence under Regulation 4(3) of the Fisheries Regulations 1964, punishable under Regulation 9 of the same Regulations."

Save and except for the date, time, place and licence number the charge against the other two appellants, i.e. Nos. 25/77 and 28/77 are couched in identical terms.

Regulations 4 and 9 of the Regulations, omitting the irrelevant parts, provide:—

"4.(1) No person shall, except under the terms and conditions of a valid licence issued by licensing officer —

(a) ....

(b) use for the purpose of fishing any fish trap, net, long line, or pole and line for live bait fishing;

(2) ....

(3) Any person who contravenes any of the provisions of this regulation or who is found in circumstances showing that it is his intention to contravene any of the said provisions shall be guilty of an offence

4. Any person guilty of an offence under these Regulations shall be liable to a fine of five hundred dollars."

Condition 1(a) of the licence of the Trawl Fishery 'A' (Conditions for Gulf-coast and Sabah Types Prawn Trawl Fishery) is in these terms:—

"1. Type 'A' Trawlers are *not* permitted to carry out trawl fishery operation within the following areas —

(a) The sea between the State shore and the 5-fathom line."

I now turn to the charges against Accused in Appeal Nos. 26/77 and 27/77, the first of which reads as follows:—

"That you, or on about the 20th day of September, 1977, between 0930 hours and 1000 hours, at Sungei Mapan, near the Oyster Culture Experimental Station, in the District of Tawau, in the State of Sabah, did use, for the purpose of fishing, a net, to wit a trawl net, without a licence, in contravention of Regulation 4(1)(b) of the Fisheries Regulations, 1964, and thereby committed an offence under Regulation 4(3) of the same Regulations, punishable under Regulation 9 of the same Regulations."

Again, except for the date, time and place, the charge against Accused in Appeal No. 27/77 is in identical terms.

All the appellants, except Appeal No. 26/77 as to which I shall have more to say hereafter, pleaded guilty to the charges and were convicted and each of the accused persons fined as follows:—

(a) Accused in Appeal Nos. 24/77, 25/77, 26/77 and 28/77 were each fined $250 or in default 10 weeks' imprisonment;

(b) Accused in Appeal No. 27/77 was fined $200 or in default 2 months' imprisonment.

The trawler and nets were in each of the five appeals ordered to be forfeited.

Against the convictions appellants appealed on a number of grounds which are common in all the five appeals, namely that the learned trial Magistrate —

(a) erred in law in convicting the appellant without sufficiently ascertaining whether or not he did in fact appreciate the nature and true legal position of the charge aforesaid;

(b) never did explain each and every ingredient in the charge to the accused and in particular sections 15 and 19 of the Fisheries Act, 1963 (F.M. 8 of 1963) (hereinafter referred to as "the Act") therefore the appellant never did really appreciate the nature and true legal position of the charge;

(c) erred in law in convicting the appellant of the charge preferred against him when the same did not disclose an offence in law;

(d) erred in law in convicting the appellant of the said charge when the facts disclosed by the prosecution did not justify the conviction.

Section 173(b) of the Criminal Procedure Code (hereinafter called "the Code") reads:—

"173 (b) If the accused pleads guilty to a charge whether as originally framed or as amended the plea shall be recorded and he may be convicted thereon: provided that before a plea of guilty is recorded the court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him."

From the records before me, there appears to have been a failure on the part of the Magistrate to comply with the provisions of section 173(b). (See *Chua Ah Gan* v. *Public Prosecutor*[1] and *Chin Ban Keat* v. *R.*[2]).

It is also common ground that none of the appellants was in fact found at the spot at the time on the day stated in the charges. Neither it appears to me were any of the appellants caught at the places mentioned in the charges.

I turn to consider whether the charges disclose an offence known to the law.

The ingredients of each of the charges under Condition 1(a) of the said licence are:—

(1) that the accused on or about (dates mentioned) between (hours stated) was found at (places specified) near Oyster Culture Experimental Station in the District of Tawau in the State of Sabah.

(2) that he was a holder of licence (particulars supplied).

(3) that he did use, for the purpose of fishing, a net to wit, trawl net, at a place between the State shore and fathom line.

(4) that he did so in contravention of Condition 1(a) of a valid licence.

The facts as outlined by the prosecution would certainly bear not even a faint resemblance to the particulars as set out. For example, the prosecution in reciting the facts neither stated that the accused was found at the place mentioned in the charge, nor that accused used for the purpose of fishing a trawl net. What the prosecution said was that the trawler fishing boat belonged to the accused.

In a case such as this where the charge contains one or more ingredients or questions, and where the accused is not represented by counsel, it is desirable that each ingredient and each question involved should

be explained by the Magistrate himself through the Interpreter to the accused, and that the accused's replies should be recorded. If, after recording them the Magistrate is in any doubt whether the plea is an unequivocal plea of guilty, a plea of not guilty should be entered and the evidence should be called.

Under the enabling section 2 of the Act, the Minister charged with the responsibility for fisheries may make regulations relating to maritime and estuarine fishing and fisheries —

"(i) to prescribe persons by name or by office to be licensing officers for the purposes of this Act, other than the cultivation of fish in riverine waters;"

and the expression 'licensing officer' is defined in section 23 under the heading "INTERPRETATION" at page 15 of the Act.

"'licensing officer' means any person authorized to issue licences under this Act;"

The point taken on behalf of the appellants and conceded by the learned deputy before the court was that neither the Federal Minister nor the State Government has made any subsidiary legislation under the Act nor under the Sabah Fisheries Ordinance (Sabah Ordinance 8/63). Nor was any licensing officer prescribed under the Act nor have they been gazetted as such.

It falls for observation that under Article 74 of the Federal Constitution, the Legislature of the State of Sabah has concurrent legislative powers. See also Articles 73, 74 and 79, and under Item 12 of the Ninth Schedule — List IIIA — Supplement to Concurrent List for Borneo State, it is provided —

"12. Shipping under fifteen registered tons, including the carriage of passengers and goods by such shipping; maritime and estuarine fishing and fisheries."

A similar situation in which no such regulation have been promulgated arose in the case of *Cheam Gaik Chye* v. *Public Prosecutor*[3] where the court there has this to say: —

"The appellant was convicted of being found in possession of a trawler net without a licence from the Director of Fisheries, Malaysia. Section 9(1) of the Fisheries Ordinance (subsection Cap. 146) provides for issue of licences 'by such persons as are prescribed' but sub-section (2) provides that refusal or revocation, as distinct from issue or grant rested with the Director of Fisheries. The 1963 Fisheries Act provides for the Yang di-Pertuan Agong by regulations under section 2(i) 'to prescribe persons by name or by office to be licensing officers'. No such regulations have been promulgated and it is equally clear that the charge of not holding a licence from the director of fisheries does not disclose an offence in law."

That being the position, there was, in my opinion, no proper exercise by the licensing officers of the power which, so far as the court can ascertain has not been vested in them and the purported exercise of their authority in issuing licences is accordingly invalid.

When one looks at the charges in the light of the particulars of the offence as set out one sees that it is charging the appellants with an offence which in fact by statute the appellants are incapable of committing. (See *Municipal Commissioners* v. *Chuah Seng & Ors.*;[4] *Cheah Gaik Chye* v. *Public Prosecutor*[5] and *Cheah Yew Fatt* v. *Public Prosecutor*[6]).

If it be correct that there is no offence known to the law as charged, it would be a wrong decision of the law for the Magistrate's Court to accept a plea of guilty and *a fortiori* it would be wrong for the Magistrate to allow the matter to proceed to judgment. The point has been succinctly put by Salmon L.J. in *R.* v. *Rollafson*[7] and I quote the sentence from his judgment. Salmon L.J. said at page 833-H: —

"The fact that he pleaded guilty is no bar to this appeal providing that it would have been impossible for him to have been lawfully convicted on this offence: . . . ."

The law on the subject was considered in the Federal Court decision in *Sau Soo Kim* v. *Public Prosecutor*[8] in which Lee Hun Hoe C.J. Borneo in the course of his judgment said at page 135: —

". . . Being unrepresented he would not have the benefit of legal advice. It is thus proper for an appellate court in such a situation to correct miscarriage of justice arising from misconception of law, irregularity of procedure or apparent harshness of treatment resulting in injury or undue hardship to such an accused. For example, if an accused pleaded guilty to a charge which creates no offence known to law and further the facts also disclose no offence, clearly such a conviction could not be allowed to stand. Surely, such a plea of guilty to what is not an offence is no plea at all."

That takes us to a consideration of Appeal Nos. 26/77 and 27/77. The grounds of appeal in respect of Appeal No. 26/77 are as I have earlier indicated the same as in the other appeals, save that this appellant Teo Un Jong was not present in court. No summons under section 136(1) of the Code had been issued requiring his presence in court. His uncle was presumably asked by the police to represent him and the uncle pleaded guilty to the charge.

The learned deputy following the best traditions of the Bar in the course of a very helpful submission did not think fit to contend otherwise but admitted at the Bar that the accused was not present in court.

In the last of the appeals No. 27/77 Ho Siew Tohin, the accused applied for a fishing licence and was awaiting for approval. Notwithstanding that, he, like the other accused persons, pleaded guilty to the charge. I am nonetheless of the view that the other objections raised and discussed above in the other appeals apply equally to this appellant.

When the record of proceedings in the lower court are fully examined there is nothing in the facts recorded in the above appeals which lead to the conclusion that any of the five appellants was guilty of the offences charged.

In the result, I must hold that the convictions in the lower court in the above five appeals are a nullity and that the convictions must accordingly be quashed and the sentences set aside. It follows that any forfeiture of the exhibits in the appeals must also be returned to the appellants. The fines, if paid, must be refunded to the appellants.

I further consider it to be unfair to the appellants having regard to the unsatisfactory nature of the prosecution case for other reasons to which I have expressed to put them to the peril of a re-trial, and the appellants are accordingly acquitted and discharged.

Convictions quashed, appeal allowed.

Solicitors: *Yong & Wong; N.Y. Hiew & Co.*